

STATE OF MICHIGAN  
IN THE SUPREME COURT

ARTHUR JARRAD,

Plaintiff-Appellee,

v.

INTEGON NATIONAL INSURANCE  
COMPANY, a foreign insurer,  
a GMAC INSURANCE COMPANY,

Defendant-Appellant.

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**Supreme Court No. 126176**

Court of Appeals No. 245068

Ingham County Circuit Court  
No. 00-92678-NF

126176

**SUPPLEMENTAL BRIEF**  
**IN SUPPORT OF DEFENDANT-APPELLANT'S**  
**APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**

**FILED**

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**QUESTION PRESENTED FOR REVIEW**

**Where wage-loss benefits are paid under a self-insured long-term disability plan -- in all respects equivalent to a long-term disability insurance policy, does entitlement to such benefits constitute "other health and accident coverage" within the meaning of §3109a of the No-Fault Act, so as to effectuate an insured's election of lesser-premium "coordinated" no-fault coverage and avoid wasteful double compensation for the insured's wage loss?**

The Circuit Court answered, "No."

The Court of Appeals answered, "No."

Plaintiff JARRAD would answer, "No."

Defendant INTEGON answers, "Yes."

## INTRODUCTION

The issue presented in this matter is one that involves the drawing of accurate and meaningful distinctions. The case at bar is not exactly like *Spencer v Hartford Co*, 179 Mich App 389; 445 NW2d 520 (1989), nor is it exactly like *Rettig v Hastings Mutual Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992); but it is more materially like one than the other.

In this case, Plaintiff received benefits from an employer-provided long term disability plan to compensate him for his inability to earn wages when he became disabled from the injuries he sustained in an automobile accident. Defendant INTEGON, whose no-fault insurance policy (as in both *Spencer* and *Rettig*) provides only “excess” wage loss coverage, contends that it properly calculated Plaintiff’s benefits by taking his LTD benefits into consideration and paying only the amount of its total benefit that exceeded the payments already being made by the LTD plan. In *Rettig*, the no-fault insurer was permitted to pay excess-only benefits; in *Spencer*, no set-off was allowed. Is the case at bar more appropriately aligned with *Rettig* or with *Spencer*?

In Plaintiff’s view, our case is more like *Spencer* because *Rettig* involved a long term disability *insurance policy* and our case (like *Spencer*) does not. Defendant contends, however, that this is not a material distinction, since the LTD plan in this case -- a “self-insured” plan -- is in all respects equivalent to a disability *insurance policy*. Indeed, the *Spencer* opinion itself recognizes that coverage under an employer’s “self-insurance” plan qualifies as “other health and accident coverage” within the meaning of MCL 500.3109a. *Spencer*, 179 Mich App at 398.

Thus, contrary to Plaintiff's view (and that of the lower courts), Defendant submits that *Rettig* is essentially identical to the case at bar and that *Spencer* is the case that is materially different. Where *Spencer* involved "benefits" (wage continuation payments) paid directly by the employer pursuant to a provision in a collective bargaining agreement (whereby the employer agreed to supplement workers' compensation payments), Plaintiff JARRAD's benefits were paid *not* by the employer but by a third-party administrator (Aetna Life Insurance Company); they were paid *not* out of funds belonging to the employer but from a separate pool of funds consisting of employee and employer contributions; and they were paid *not* pursuant to any provision in a collective bargaining agreement but "pursuant to *the Plan*" (Plaintiff's affiant so testified -- *see*, Application for Leave to Appeal, Exhibit 4, ¶5) (emphasis added) -- whose coverage is in every respect equivalent to the "protection typically provided by health insurance plans, which include payments for medical expenses resulting from an accident as well as wage-replacement benefits." *Rettig*, 196 Mich App at 333.

In short, this Court should conclude that the case at bar is, in all material respects, identical to *Rettig*, since the insured-plan vs. self-insured plan distinction is not material; and the Court should conclude that *Spencer* is materially distinguishable since, unlike both *Rettig* and our case, the employee's right to wage continuation payments in *Spencer* did *not* correspond to benefits typically provided by an employer-provided insurance (or self-insurance) plan.

In its application for leave to appeal, Defendant urged the Court either to grant leave to appeal or, in lieu of granting leave to appeal, to enter an order reversing the judgment of

the Court of Appeals for the reasons stated in the dissenting opinion of Judge Brian K. Zahra. On November 4, 2004, the Court ordered that his matter proceed to oral argument “on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1),” and invited the parties to file supplemental briefs. Defendant submits that peremptory relief as indicated above is appropriate. In support thereof, this brief will address the arguments asserted in Plaintiff-Appellee’s Answer in Opposition to Defendant-Appellant’s Application for Leave, and show that they simply do not merit plenary review.

### **ARGUMENT**

**Plaintiff’s argument, premised on “wage continuation benefits that are paid gratuitously by an employer,” is entirely without merit, since this case involves neither “wage continuation” benefits, benefits that are “gratuitously” paid, nor benefits paid “by an employer.”**

The precise issue presented is whether the protection afforded by the Michigan Department of Civil Service’s “Self-Funded Long Term Disability Benefits Plan” (Exhibit 4A of Defendant’s application), under which Plaintiff received monthly income benefits following his disabling accident, constitutes “coverage” within the meaning of MCL 500.3109a of the no-fault act.

In its application for leave to appeal, Defendant INTEGON articulated the difference between a mere agreement between an employer and its employees whereby an employee who becomes ill or disabled from work would continue to receive wage payments for a period of time (so-called wage continuation benefits) and a true employer-provided disability

benefits plan that happens to be self-insured. The former is not “actuarially sound,” Defendant argued (*see, Orr v DAIIE*, 90 Mich App 698, 690-691; 282 NW2d 177 (1979)), while the latter, even though funded by a pool of employer and employee contributions rather than traditional insurance premiums, does “correspond[] to the typical health insurance plan generally provided as a benefit of employment” and thus is subject to §3109a coordination. *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App at 398 (acknowledging that a “self-insurance health plan” qualifies as “other health and accident coverage” under §3109a).

In his answer opposing Defendant’s application for leave to appeal, Plaintiff fails to confront the issue of whether the protection actually afforded under his employer’s Long Term Disability Plan constitutes “coverage” within the meaning of §3109a. Instead, Plaintiff recasts his employer-provided benefits into something they simply are not: “wage continuation benefits that are paid gratuitously by [the] employer” (*see*, Plaintiff’s Answer in Opposition, pp. ii and 11 [principle argument heading], and p. 1 [question presented]).

If the monthly payments Plaintiff received after his automobile accident had been merely “continued wage payments gratuitously paid directly by his employer,” there is little doubt that they would not qualify as “other health and accident coverage” and, accordingly, the coordination of benefits authorized by §3109a would not apply. Since Plaintiff’s arguments, however, do not acknowledge (and thus do not address) the true nature of the LTD coverage here at issue, they provide no substantial opposition to the grant of peremptory relief in favor of Defendant.

As a preliminary note, the Court should disregard Plaintiff's references to "19 years of appellate case law" purportedly refuting the wage loss coordination at issue in this case. There simply is no such precedent. As indicated, the case most closely aligned with the case at bar, *Rettig v Hastings Mutual Ins Co, supra*, supports no-fault coordination with long term disability benefits. The one or two other cases on which Plaintiff relies for its assertion are entirely inapposite to the case at bar and have been fully addressed in Defendant's application brief.

Defendant did not previously address *Brashear v DAIIE*, 144 Mich App 667; 375 NW2d 785 (1985) (the case on which Plaintiff apparently bases his assertion regarding "19 years" of precedent), but the case has no application whatsoever to the issue at hand. Factually, *Brashear* is an example of an employer "gratuitously" paying continued wages to an injured employee. Whether this type of payment would constitute "coverage" for purposes of §3109a coordination (it clearly wouldn't), was not remotely at issue since the case was not about coordination of benefits at all. Defendant has no quarrel with the holding in *Brashear*; it simply is inapplicable to this case.

Plaintiff's remaining arguments likewise provide no reason for peremptory relief not to be granted in favor of Defendant. First, despite his continuous references to the contrary, the long term disability benefits received by Plaintiff were *not* "wage continuation" payments, and they were *not* paid "by the employer." In *Spencer, supra*, the employer had made an express promise (in a collective bargaining agreement) to continue paying disabled employees their wages, along with their workers' compensation benefits, to the extent necessary to keep the employee's total payments equal to their pre-injury rate of pay.

*Spencer*, 179 Mich App at 392 (quoting the CBA provision). In that situation, the employer is the entity making the “wage continuation” payments, and the payments obviously would be from the employer’s own funds. Not so in this case.

Here, the LTD benefits Plaintiff received fundamentally differ from the “wage continuation” payments in *Spencer*. The entity paying these benefits was Aetna Life Insurance Company (as administrator of the LTD plan -- *see*, Defendant’s Application, Exhibit 4A, p. 2), and they were paid *not* out of employer’s funds but out of a pool of funds created primarily by the contributions of Plaintiff JARRAD and other Michigan Civil Service employees statewide, and, secondarily, out of contributions made by the employer (Defendant’s Application, Exhibit 4, ¶4). The employer thus did not make continued wage payments, the *Plan* made disability benefit payments.

Nor is it accurate to characterize Plaintiff’s receipt of LTD benefits as having been “gratuitously” paid or paid “because of a collective bargaining agreement” (Plaintiff’s Answer in Opposition, pp. ii, 2, 11, 19). Having qualified for disability benefits under the terms of “coverage” contained in the LTD plan document itself (Exhibit 4A of Defendant’s Application), the plan administrator was legally obligated to pay the benefits. It is thus materially inaccurate to regard them as having been “paid gratuitously.”

The Court, similarly, should reject Plaintiff’s assertion that his benefits “were payable because of a collective bargaining agreement, and not an insurance policy,” as if this were an “either/or” situation. To be sure, Plaintiff’s benefits were not paid pursuant to an “insurance policy,” but they certainly were not paid pursuant to a collective bargaining

agreement, either.<sup>1</sup> Plaintiff's CBA does not provide any terms of coverage; rather, it contains only the employer's promise to "continue the Long Term Disability Insurance coverage in effect" (*see*, Exhibit 4B of Defendant's Application). In this instance, the employer kept its promise of providing such "*insurance coverage*" by providing the Michigan Department of Civil Service "Self-Funded Long Term Disability Benefits Plan" (Exhibit 4A of Defendant's Application).

This demonstrates, first (and rather dramatically), that the "coverage" under Plaintiff's self-insured LTD plan must be regarded as essentially equivalent to similar coverage under a disability insurance policy; but it also demonstrates that Plaintiff is simply wrong in his assertion that his payments were made pursuant to a collective bargaining agreement. Whether Plaintiff's employer had kept its promise of providing LTD coverage by establishing a self-funded plan or by purchasing a group insurance policy, the benefits ultimately received would be paid pursuant to that plan or policy, not the CBA. It is thus clearly inaccurate to say that Plaintiff's LTD benefits were paid pursuant to (or "because of") a collective bargaining agreement; rather, they were paid directly pursuant to the LTD Plan -- as Plaintiff's affiant expressly established (Defendant's Application, Exhibit 4, ¶5).

Plaintiff's brief in opposition to the application for leave also seeks to avoid application of §3109a ("other health and accident coverage on the insured") by asserting that the term "coverage" applies only to the protection provided under an insurance policy

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<sup>1</sup> Compare, *Spencer*, 179 Mich App at 392, and *Wesolek v City of Saginaw*, 202 Mich App 637, 638-639; 509 NW2d 546 (1993), both of which did involve collective bargaining agreement provisions that dictated partial wage payments.

(Plaintiff's Answer in Opposition, pp. 19-20). Defendant has shown, however, that the term is applicable to variety of insurance *and* insurance-like benefits (*see, Dep't of Social Services v American Commercial Liability Ins Co*, 435 Mich 508, 513 n. 10; 460 NW2d 194 (1990), and *Lewis v Transamerica Ins*, 160 Mich App 413, 418-419; 408 NW2d 458 (1987)).

Besides, where a coordination clause refers to other "insurance" coverage, it is properly regarded as including coverage under a "self-insurance" plan, as well. *Allstate Ins Co v Elassal*, 203 Mich App 548, 554; 512 NW2d 856 (1994) (coordination with "other collectible insurance" applied to the self-insured coverage of Enterprise Leasing, since its self-insured status "was the functional equivalent of a commercial insurance policy"). As noted above, the self-insured LTD plan in this very case is the vehicle by which the State of Michigan meets its contractual commitment of providing "Long Term Disability Insurance coverage" to Plaintiff's collective bargaining unit (Exhibit 4B of Defendant's Application); and throughout the Plan document itself (Exhibit 4A) the word "coverage" appears to reference the protections and benefits provided by the Plan -- clearly because the Plan *is* the "functional equivalent of a commercial insurance policy."

As his final argument, Plaintiff would ask the Court simply to disregard the fact that the insurance policy he purchased from Defendant contains only coordinated wage loss coverage. The rule Plaintiff apparently would advance is that an insurer must, as a precondition to relying on the clear terms of its policy contract, make an affirmative showing (apparently by the testimony of an insurance underwriter) that the premiums charged accurately reflect a fair exchange for the coverage received (*see, Plaintiff's Answer in*

Opposition, pp. 22-23). On the false premise that wage loss coordination simply has not been allowed under Michigan law for 19 years, Plaintiff asserts (without support) that his premiums are no lower than they would have been had he purchased a policy that does not contain a wage loss coordination clause.

There is no basis for imposing on the insurer the burden of proving, as a precondition to relying on its coordination clause, that the policy holder was charged an appropriate premium. In *Smith v Physicians Health Plan, Inc*, 444 Mich 743; 514 NW2d 150 (1994), this Court held that health insurer was not required “to demonstrate a premium rate reduction to validate a coordination of benefits clause in the certificate of coverage.” *Id.*, at 756. The matter was purely “a matter of contract between the concerned parties.” *Id.*, at 758. Here, where §3109a of the no-fault act affirmatively requires an insurer to reduce premiums in accord with offering coordinated coverage, and where the insurance commissioner oversees such “deductibles and exclusions” offered by no-fault insurers, there is even less reason to require an insurer in a given case to establish that premiums were appropriately reduced. *See, Smith*, 444 Mich at 778 (Levin, J., dissenting); *Gibbard v Auto-Owners Ins Co*, 179 Mich App 54, 60; 445 NW2d 182 (1989) (Murphy, J., dissenting).

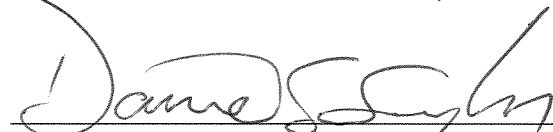
Plaintiff elected to purchase “excess” medical and “excess” wage loss coverage in his no-fault insurance policy (Exhibit 3 of Defendant’s Application), which cost less than a policy providing non-coordinated coverage -- or else it could not be approved by the insurance commissioner because it would violate §3109a. Defendant was not required to offer proof in this regard. Plaintiff’s Argument D is without merit and should be rejected.

**RELIEF REQUESTED**

For all the foregoing reasons, and those more fully set forth in the previously-filed Application for Leave to Appeal, Defendant-Appellant, INTEGON NATIONAL INSURANCE COMPANY, respectfully requests that the Court reverse the judgments of the Ingham County Circuit Court and Court of Appeals, and order that Defendant is entitled to summary disposition in its favor.

Respectfully submitted,

**GARAN LUCOW MILLER, P.C.**

A handwritten signature in dark ink, appearing to read "Daniel Saylor", is written over a horizontal line.

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